From Omnipotence to Impotence: American Judges and Sentencing

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PREFACE

It is a pleasure to be in this school, and in particular, this setting. Justice Blackmun is a hero to me. I say that as a citizen, a lawyer, and now, as a judge. His work reflects the struggles inherent in the job of judging—confronting issues about which people feel deeply, grappling with one's own feelings, the judgments of one's colleagues, not to mention the limitations and possibilities of legal doctrine. In the area I teach and work, sentencing, Justice Blackmun's decision in *United States v. Mistretta* was a watershed.[1] In *Mistretta*, Justice Blackmun upheld the constitutionality of the United States Sentencing Guidelines.

As I read the decision now, some fifteen years later, I realize that the Court made certain entirely reasonable assumptions about the institutions that would enforce the Guidelines. The Court assumed that the Guidelines would be applied by a robust and independent judiciary, whose time-tested expertise would hone them, permitting them to more adequately reflect the realities of federal sentencing. The Court assumed that the judges would work closely with a sentencing commission located in the judicial branch that would, like the judges, be independent of the political winds, an independence derived in part from their expertise as well. It assumed that Congress would happily allow this new synergy—between courts and the Commission—to create new sentencing standards, more rational and more fair than those which had preceded it.

But the assumptions were wrong for a host of reasons that Justice Blackmun could never have anticipated. One of them is the subject of this talk. The judiciary failed Justice Blackmun and us.

Many things can be said about the United States Sentencing Guidelines. (Most of them have been said by Professor Douglas Berman.[2]) They have contributed to the increase in an already legendary incarceration rate in the United States. They have tripled the length of prison terms and resulted in the wildly disproportionate imprisonment of African Americans.[3] They have transformed the sentencing process and in some ways, made it less transparent, and unquestionably less fair.

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1 United States v. Mistretta, 488 U.S. 361 (1989).

2 Professor Berman's most recent observations, that is, those not in his blog (http://sentencing.typepad.com), can be found at Douglas Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006).

3 MARC MAUER, RACE TO INCARCERATE 124 (1999). The Sentencing Project found that in 1989

But my topic is different—not the Guidelines' impact on defendants, or on defense lawyers, or on prosecutors, or prison populations—which is considerable—but rather the Guidelines' impact on judges, and on the process of judging. The change in judging can be summarized as a transformation from the view that sentencing was in the area of an American judge's unique competence to its polar opposite, hence the title of this talk, "From Omnipotence to Impotence," in twenty short years.

I. INTRODUCTION

Let me frame the discussion generally: there are three periods in American sentencing.[4]

The first period, prior to the 1980s, was the period when indeterminate sentencing was in its heyday. Sentences could be set anywhere within the broad ranges outlined by Congress. American judges, like judges in other common law countries, believed that sentencing was an area of their special competence. Indeed, judges believed that they were so skilled at sentencing that they resisted all efforts to restrict their discretion, even opposing proposals for appellate review, which had long existed in other countries. American judges waxed indignant on the subject of any external sentencing restrictions. Sentencing discretion was central to their work, a pillar of judicial independence. So clear were they on this point that between 1987 and 1989, after the United States Sentencing Guidelines were enacted, two hundred judges declared them to be unconstitutional.[5] (Justice Blackmun rejected these challenges in *Mistretta*).

Over the next 18 years, and notwithstanding principled judicial opposition, something remarkable happened. Judges enforced the new Guidelines with a rigor that was not at all required by the text of the Sentencing Reform Act ("SRA")[6] or its legislative history, or by the language of the Guidelines themselves. Judges at all levels, trial and appellate, applied the Guidelines as if they were, in the words of two scholars, *diktats*.[7] If you envision Guideline regimes as being situated on a continuum from voluntary to mandatory, this was a period when the Guidelines slid precipitously to the mandatory end, much to the chagrin of the original reformers.

The third period is framed by the Supreme Court's recent decision in *United States v. Booker*.[8] Mandatory guidelines, the Court declared, were unconstitutional,

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nearly one in four black males between 20 and 29 was under some form of criminal justice supervision on any given day. By 1995, the figure had increased to one in three.

[4] *See generally* Judge Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005).

[5] KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING 196 n.12 (1998).

[6] Sentencing Reform Act, 28 U.S.C. §§ 991–998 (1996); 18 U.S.C. §§ 3551–3626 (1996).

[7] STITH & CABRANES, *supra* note 5, at 95 (describing the Guidelines as a set of "administrative *diktats*" that the Commission "promulgated and enforced *ipse dixit*").

[8] United States v. Booker, 543 U.S. 220 (2005).

violating the Sixth Amendment to the United States Constitution. To avoid invalidating the Guideline regime *in toto*, the Court declared that henceforth the Guidelines would be "advisory." But judicial behavior that existed before *Booker* continued. At a time when sentencing discretion was apparently restored, court after court insisted that the advisory Guidelines were entitled to considerable, even presumptive, weight, effectively trumping any standards that common law judges might create in their stead. Notwithstanding a rich history of judicial sentencing predating the Guidelines, many federal judges came to believe that they were not competent to sentence at all, absent explicit rules externally promulgated by Congress or the Commission. These entities, they concluded, had far greater expertise than judges did.

Why this dramatic shift from sentencing omnipotence to impotence? And what lessons does it offer to other countries and states in the middle of "Guideline" debates? What important cautionary tale does it tell about sentencing reform?

First, a caveat: I understand that I am treading in an area of considerable complexity; that there are a host of reasons for this change in judicial attitudes, some beyond the scope of this talk. For example:

A. *"Populist Punitiveness"*

In the late 1980s, some scholars identified a rise in "populist punitiveness."[9] Crime became the fodder of political campaigns; so called "lenient" judges were parodied on the evening news and during unrelenting "24/7" news coverage. By the time of the presidential contest in 1988, the politicization of criminal justice had become a national phenomenon.

In the mid-90s, the debate veered in a distinctly anti-judge direction. One cannot minimize the adverse, even threatening, climate in which sentencing decisions were now being made.[10] Under the circumstances, it was far easier for judges to say, "the Guidelines made me do it" than to take responsibility and criticism for sentencing judgments.

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[9] *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49–51 (1997).

[10] Scholars have remarked at how much "populist punitiveness" collided with the approaches advocated by all other experts.

> The politicians, bolstered by what is taken to be nearly universal public support, compete to propose ever more severe responses to criminal behavior. The result is sanctions that have more sound-byte appeal than penological justification. Although the new penology is concerned with high-risk populations, populist punitiveness is as obsessed as ever with dangerous individuals. Whereas the new penology treats crime as a normal fact of life to be managed, populist punitiveness insists on a zero-tolerance approach and believes that with severe enough sanctions, crime can and should be completely eliminated.

Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 455 (1998).

B. *The Administrative State*

Scholars have written about the extent to which government functions of all kinds have been taken over by administrative agencies, creating the so-called "administrative state." The idea had particular appeal in the late twentieth century America, namely "that experts insulated from politics are well suited (and sometimes best suited) to make important public choices."[11] Sentencing commissions are only the latest incarnation of this trend.

C. *Shifting Winds of Discretion and Formalism*

Roscoe Pound identified legal trends as comprising a pendulum, swinging from excessive certainty to excessive discretion and back.[12] The current era arguably involves a return to certainty and formalism. Nevertheless, even in the early 1900s, which Pound described as an "excessive certainty" period, sentencing remained highly discretionary. It was not until the 1980s that formalism intruded into this arena as well.

D. *The Rise of Retribution*

Sentencing changed, with a growing emphasis on retribution rather than rehabilitation. The public, as well as certain members of the academy, effectively gave up on rehabilitation as a central purpose of sentencing.[13] Retribution and incapacitation were more certain, more enforceable, and significantly more accessible to the public. The proper sentence could be the subject of debate with the late night talk show host, or of rhetorical flourishes in Congress. As sentencing purposes changed, it followed that different kinds of expertise would be valued, expertise which, over time, many judges—not to mention the public and the politicians—came to believe they lacked.

But I want to focus generally on the choices that the Guideline drafters made, choices which exacerbated these trends, as well as the choices that judges made in enforcing the Guidelines.

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[11] Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 253–54 (2005). *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). For a different perspective, on the application of the administrative state to sentencing, see Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

[12] Jay Tidmarsh, *Pound's Century and Ours*, 81 NOTRE DAME L. REV. 513, 522 (2006)

[13] *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). Martinson's 1974 work, which he subsequently recanted, suggested that rehabilitation did not work. Martinson's recantation is in Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) (noting that "new evidence" leads him to reject his conclusion in *What Works? Questions and Answers About Prison Reform*).

II. THREE PHASES[14]

A. *Indeterminate Sentencing*

1. The Ideals

During the indeterminate sentencing period, the principle purpose of sentencing was rehabilitation. And from that purpose flowed a different idea of who was an expert and different procedures to serve that expertise. The judge was the "expert" in individualizing the sentence to reflect the goals of punishment, including rehabilitation. His or her role was essentially therapeutic, much like a physician. Fundamentally different standards evolved between the trial stage and the sentencing stage, as befitting the very different roles of judges and juries. The trial stage was the stage of rights, evidentiary rules, and high standards of proof. In the sentencing stage, in contrast, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system, a fair preponderance of the evidence. The approach made sense. You would no more limit the kind of information that a judge should receive in order to exercise his or her "clinical" sentencing role than you would limit the information available to a medical doctor in determining a diagnosis.[15]

Congress had no expertise in rehabilitation, a process that is uniquely individualized. While Congress could set broad retributive goals, it lacked the ability to apply them in a given case. In fact, in many areas Congress's role was almost symbolic, occasionally intervening to increase a given punishment range after a celebrated crime, the "crime du jour." Nor was Congress able to rationalize the punishments across different offenses; all efforts to reform the federal criminal code had failed.[16] The criminal justice system was, for the most part, left to the sentencing experts, the judges.

2. The Flaws

Judicial expertise in sentencing was, to a degree, mythological. No judge was really trained to exercise the considerable discretion he or she had. There were no courses in law school. Criminal procedure was taught as if the enterprise ended with the verdict and, to a lesser extent, the plea. Law schools, for the most part, did not

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[14] This discussion draws on two different articles: Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U.L. REV. 419, 424 (1999); Gertner, *When Everyone Behaves Badly*, *supra* note 4.

[15] Of course, the judge was not the only expert here. His or her discretion sat alongside that of parole boards. The judge set the sentence within the broad ranges established by Congress, but the sentence itself involved a minimum and maximum term. Parole boards were charged with determining when an individual could be released within that range.

[16] Robert H. Joost, *Federal Criminal Code Reform: Is it Possible?* 1 BUFF. CRIM. L. REV. 195, 202 (1997).

teach penology or criminology—what sentences were efficacious, what approaches worked to effect deterrence or promote rehabilitation, etc. In part, this was the failure of research. The literature, particularly about rehabilitation, was meager. It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without *Gray's Anatomy*.[17]

Unlike medicine, in which clinical judgments are reviewed by other experts, there was, with few exceptions, no peer review, no "clinical rounds" for judges. Indeed, few judges were second-guessed about their sentences at all. Unlike other common law countries, such as Australia or England, there was no appellate review of sentencing. In the absence of any review, there was no pressure on judges to generate sentencing standards or even to encourage the advocates to offer authoritative studies about, for example, sentencing drug addicts, or strategies to deal with recidivism.[18]

Indeed, without appellate review, few judges bothered to write anything about their sentences, much less reasoned decisions. If you aren't asked about your sentence, you don't have to answer.[19] Nor was there much real sentencing advocacy. In Massachusetts, for example, sentencing immediately followed the verdict or plea—without briefs, investigation, research or indeed, thought.

The result: since there was no real expertise—or at least, no consistent expertise across the judiciary—disparity in sentencing outcomes was a concern, although not nearly as much as current mythology suggests.[20] There were judges whose sentencing was aptly described in Judge Frankel's *Criminal Sentences: Law Without Order* (the book that helped precipitate sentence reform) as the "unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[21] There were unquestionably racial disparities in sentencing, a tendency to punish black offenders more severely than white ones.

But there was an additional problem. The system was flawed not just because there were disparities. It was flawed because it did not effectively carry out any of the non-disparity purposes of sentencing. Disparity inheres in any system that seeks to

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[17] Gertner, *When Everyone Behaves Badly*, *supra* note 4, at 572.

[18] *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentencing Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445 (1997).

[19] Reitz described it as follows:

> The absence, or near absence, of appellate input into the law of criminal punishment was due in part to the embarrassment that there was no substantive law of sentencing to be applied at the trial level. Under indeterminate sentencing schemes, trial judges were given discretion to fix any penalty within the ceiling provided by the statutory maximum. In so doing, judges were instructed to consult any and all factors having to do with the crime itself or the offender—including the offender's whole life, character, and background. With such a free-form thought process in gear, there were effectively no legal principles against which a sentence could be tested on review.

Id.

[20] STITH & CABRANES, *supra* note 5, at 111.

[21] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972).

provide proportional punishment, that tailors the punishment to fit, not just the crime, but the criminal, and that purports to be a national system. We could tolerate some—not all—of this disparity if it were based on real differences between offenders, if it were focused on efficacy, *what works*. But it did not; in many ways, it was slapdash, ad hoc.

B. *The Guideline Movement—Slide to Mandatoriness*

Between 1966 and 1984, after criminal code reform failed, Congress turned to rationalizing sentencing. Within the broad sentencing ranges spelled out by Congress, and in the context of the existing chaotic substantive criminal law, specific sentencing guidelines would be developed. To craft these new guidelines, the SRA created a new expert, a Sentencing Commission. The question was how this new entity would interact with the judiciary; whether the new expert would *supplant* rather than *supplement* the judicial experts. It could have gone either way.

Disparity in sentencing can be addressed simply by setting national standards, whether it be legislating the sentencing benchmarks that judges had actually been applying, or identifying a set of average sentences for a given offense. But the Commission envisioned by the SRA was to be more than a codifier of existing sentences. It was supposed to craft guidelines to reflect the latest scientific studies in effectuating all of the purposes of punishment, including deterrence and rehabilitation.[22] In that respect, it was to contribute a new kind of technical or substantive expertise to the sentencing process, an expertise not regularly found in courts or in Congress.[23]

Moreover, in addition to considering scientific studies, the Commission was to do what Congress had been unable to do in criminal code reform, and what the courts had never been asked to do, namely rationalize punishments across offense categories. The approach was "limited retribution," ranking punishments depending on the characteristics of the offense and offenders. While the drafters agreed that it was difficult to set the appropriate sentence in an individual case with any precision, at the very least a rough proportionality could be achieved among offenses.[24] Since the reformers also assumed that sentences would remain roughly where they were before the Guidelines—sadly, a truly false assumption—"limited retribution" meant that

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[22] 28 U.S.C. § 991(b)(1)(C) requires the Commission to develop Guidelines that will "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

[23] "The concept of an expert sentencing commission developing a body of empirical data and then applying this knowledge to systematic refinement of the sentencing guidelines was the model envisioned by advocates of sentencing reform." Samuel J. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?*, 4 FED. SENT'G REP. 137 (1991).

[24] *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 703 n.27 (2002); *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73–80 (1974).

there was a natural ceiling in terms of which offenses would be ranked. No more would there be the "crime du jour" with punishment set at a level wildly out of proportion to comparable crimes.[25]

Given the extraordinarily diverse coalition that gave birth to the SRA, it should have come as no surprise that its meaning would be in the eye of the beholder. One view insisted that the Commission's expertise would *not* supplant the judges'.[26] After all, judges would be authorized to depart from the Guidelines whenever they concluded that there was a factor "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." [27] In effect, there would be *parallel* experts—the expert commission and the expert judge. District and appellate courts would together create a common law of sentencing in the interstices of the Guidelines.

Others saw the Guidelines as a mandatory sentencing scheme from the outset,[28] with the authority and expertise of the Commission plainly trumping that of the judges, with "guidelines" shaping outcomes in the vast majority of cases. To these reformers, judges were the problem. And, while judges had the power to depart, the goal was to make certain that they would not exercise it very often.[29]

In short, the Guidelines could slide in either direction—"mandatoriness" or "advisoriness."

In the light of the robust judicial opposition to the Guidelines, one would have expected a vibrant "guidelines-*means*-guidelines" regime. Large numbers testified against the statute before Congress, or spoke out in law review articles or the popular press.[30] The general theme was that sentencing was a judge's special expertise and that sentencing guidelines represented a risk to judicial independence. Even after the

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[25] A number of articles speak to the fact that sentences would remain where they were before the Guidelines. *See, e.g.*, Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 932 (1990) (discussing the role of proportionality in sentencing).

[26] The Senate Judiciary Committee instructed judges to examine the characteristics of each specific offender thoughtfully and comprehensively. S. REP. NO. 98–225, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235. "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." *Id.*

[27] 18 U.S.C. § 3553(b)(1) (Supp. 2004). The statute 28 U.S.C. § 991(b)(1)(B) directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." The Commission noted the "difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, intro. cmt. 4(b) (2003).

[28] The Reagan administration explained that "[t]he judge, while trained in the law, has no special competence in imposing a sentence that will reflect society's values." Congressional Digest, 1984, at 182, *cited in* STITH & CABRANES, *supra* note 5, at 44.

[29] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 27.

[30] STITH & CABRANES, *supra* note 5, at 195–96 n.12.

Guidelines were implemented, there was an outcry when the Commission issued statistics about "compliance" and "non-compliance."[31] Departures should not be considered "non-compliance" with the Guidelines. They were an essential part of the sentencing regime, explicitly authorized by the Guidelines manual.[32] One might have assumed, at the very least, that common law judges would interpret the sentencing guidelines no less carefully than they interpreted the substantive criminal law, identifying ambiguity in the text, looking to the context.

C. *What Happened*

Even in the early years of Guideline enforcement, there were signs of a sea of change in judicial attitudes to sentencing. Federal judges were "passive" in their sentencing decision-making, as Professor Berman put it,[33] allowing themselves to be "marginalized" in the sentencing process. While they had the power to develop a common law of sentencing, even in the face of relatively strict "guidelines," they did not. But before I attempt to answer why, or at least, put forward a tentative hypothesis, I want to describe what a common law of sentencing might look like:

1. What the Guidelines Did Not Deal with:

Judges could have recognized that the Guidelines were in fact incomplete. Even the Commission acknowledged that it was difficult to prescribe national standards for

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[31] Daniel Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1721 n.199 (1992).

[32] In 1994, over two-thirds of federal trial judges and nearly two-thirds of federal appellate judges "strongly" or "moderately" opposed retention of the Guidelines. FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 15, 37 (1994).

[33] Douglas A. Berman made this observation in *A Common Law for the Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 93–94 (1999). He noted:

> While federal judges have been among the most active critics of the SRA and the Federal Sentencing Guidelines, they have been passive in their sentencing decision-making under the Guidelines. Under the SRA, the federal judiciary has considerable power to develop a meaningful common law of sentencing and thereby shape the content and direction of federal sentencing law. . . .
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> But federal judges have largely failed to make effective use of the means through which they can contribute to the development of federal sentencing law. By its own hand, the judiciary has undermined or simply underused the mechanisms which were intended to foster judicial involvement in the SRA's evolutionary lawmaking process. Federal judges' own failure to seize their opportunities to develop a sophisticated sentencing jurisprudence has allowed—perhaps fueled—the marginalization of the judicial role in modern federal sentencing.

Id.

sentencing, or anticipate all of the vagaries of sentencing. They could have seen their role as articulating standards in the interstices of the Guidelines.[34]

2. What the Guidelines Did Not Deal with Adequately:

They could have critically evaluated the Guidelines as they did other administrative rules. To be sure, the statute made such an approach difficult. Only the notice and comment provisions of the Administrative Procedure Act ("APA") applied to the Sentencing Guidelines.[35] Even without an explicit APA review, courts could have interpreted the Guidelines in the light of their fealty or lack of fealty to the purposes of sentencing.[36] Quantity (of drugs) and value (of loss) could have been interpreted as proxies for culpability, rather than as mandatory, inflexible rules. If you steal more, you are more culpable than if you steal less. But sometimes quantity and value are not adequate proxies—like the warehouseman paid a pittance by the ringleader to steal expensive computer equipment,[37] or the "mule" secreting drugs into the country in their bodies.[38]

3. When the Guidelines Were Vague:

They could have identified Guidelines that were vague, or that relied on concepts that were ill-defined. Common law judges never assumed that words were self executing, that they could be applied without interpretation, an understanding of the context. For example, the Guidelines used words like "extensive organization" or

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[34] The Introduction to the Guidelines notes:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

U.S. SENTENCING GUIDELINES MANUAL, *supra* note 27. *See, e.g.*, United States v. Silveira, 297 F. Supp. 2d 349, 356 (D. Mass. 2005).

[35] Congress only selectively imposed the Administrative Procedure Act upon the Commission. *See* 28 U.S.C. § 994(x) (2006). Conspicuously and intentionally absent are the APA's judicial review provisions. *See* 5 U.S.C. §§ 701–706 (2006). *See also* S. REP. NO. 98–225, at 181 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3364 ("It is . . . not intended that the guidelines be subject to appellate review . . . . There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.").

[36] *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

[37] *See* United States v. Costello, 16 F. Supp. 2d 36 (D. Mass. 1998). *See also* United States v. Emmenegger, 329 F. Supp. 2d 416 (S.D.N.Y. 1999).

[38] United States v. Jurado-Lopez, 338 F. Supp. 2d 246 (D. Mass. 2004).

"extraordinary family circumstances"[39] with minimal definitions and surely, no indication of why those lines were drawn at all.

But no common law evolved. Judges who had vigorously opposed the Guidelines announced that they were powerless to do anything about them. They intoned: "I have no choice but to impose this sentence, even if it makes no sense." Common law judges who had no problem "interpreting" other statutory provisions, simply "applied" these directives robotically. Why? The "why" helps us understand how it has come to pass that now—now that the Guidelines are advisory—not much has changed. What has changed is the judiciary.

I offer a few observations:

First, is the problem of the "tabula rasa." Guideline thinking supplanted any and all of the sentencing thinking that had predated it, to the extent that there had been any. And, as I have described, there had not been much "sentencing thinking" at all; it was a "tabula rasa," if you will. Departures obviously required an independent sentencing perspective, a *theory* of why and when the Guidelines were inapplicable. Few judges had such a perspective. Indeed, by the mid 1990s, more and more judges appointed after the implementation of the Guidelines regime defined the Guidelines themselves as fair.[40] They had never experienced anything else.

Second, was the problem of the 600 pound—or page—Gorilla, the Guidelines Manual. Into this "tabula rasa" came a particular kind of Guideline regime, specific, complex, and significantly, numerical. The Guidelines that the first Commission drafted created a new ideology of sentencing, a new approach, more like the approach of a judge in a civil code jurisdiction than a common law judge. And numerical Guidelines had an impact even beyond what one might have expected, reinforcing the phenomenon of what cognitive psychologists call "anchoring."

D. *The Civil Code Ideology of the Sentencing Reform*

The premises of the Guidelines transformed common law judges into civil code clerks. The following is John Merryman's description of the civil code system:

> The judge becomes a kind of expert clerk. . . . His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of

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[39] United States v. Footman, 66 F. Supp. 2d 83, 93 (D. Mass. 1999); United States v. Lacarebba, 184 F. Supp. 2d 89 (D. Mass. 2002); Gertner, *When Everyone Behaves Badly*, *supra* note 4, at 581.

[40] According to the Federal Judicial Center, 574 out of 638 currently active federal district court judges (89.97 percent) were confirmed after the guidelines went into effect on November 1, 1987. Thus the great majority of judges have no experience with discretionary criminal sentencing. History of the Federal Judiciary (Biographical Directory of Federal Judges, The Federal Judges Biographical Database), http://www.fjc.gov/public/home.nsf/hisj.

> scholastic logic. The major premise is the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.[41]

Put otherwise, the judge in a civil code system was merely the "operator of a machine designed and built by legislators."[42] Sound familiar?

A simplified rendering of the civil code and common law systems would go like this:[43] in a civil code system, the statutory law is seen as comprehensive, the work of experts. If there were gaps, the experts had to fill them, not judges. As a result, judicial decision-making was as Merryman described, formulaic. Civil code judges talk about the "solution" to the case, or the "answer." In a common law system, statutes are seen as the product of political compromise, not drafted by experts, and surely not comprehensive. While statutory language binds a judge if it is clear, common law judges are not surprised to find otherwise, namely, ill-defined words, inconsistent provisions. Moreover, common law judges rarely talk about "solving" a case, as if there were only a single, clear "answer." Rather, they will identify competing principles, describe why one applies to the case at bar, look to precedent, argue by analogy.

The Federal Sentencing Guidelines have been interpreted more like civil code than a statute in a common law regime: They were viewed as comprehensive; they were the work of "experts," and if there were gaps, the experts, notably, the Sentencing Commission, had to fill them. The Commission would resolve circuit conflicts; the Commission would answer all questions. The judges were to be clerks, not interpreting the document, which after all, was essentially perfect, but simply providing sentencing "answers."

The premises were flawed, as I have described: The Guidelines were not intended to be, and were not in fact, comprehensive. There were gaps, which the drafters acknowledged. They were not drafted by sentencing experts, at least not as the kind of experts the statute (much less a civil code system) envisioned. The Commission did not review the efficacy of sentences: Why ten years for one offense, five for another? When will intensive probation work? What offenses or offenders are amenable to rehabilitation? In what way would this sentence reduce recidivism or relate to any of the other purposes of sentencing?

To the extent the guidelines were based on "scientific" data, the data was skewed, and at times, ignored. The Commission simply calculated the average length of sentences in the United States—and then increased them. The Guidelines were not even a restatement of existing sentencing standards. The Commission did not look closely at what factors judges actually used in calculating sentences. It simply

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[41] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 36 (2d ed. 1985).

[42] *Id.*

[43] I recognize that this description of civil code and common law systems is overstated that few systems are purely one or the other. I offer this outline simply to show the paradigmatic examples of each kind of system.

compared gross sentencing outcomes and decided what factors *must have* been significant.[44] Finally, rather than arriving at Guidelines to implement all of the purposes of the SRA, the Commission emphasized one purpose above all others, the problem of sentencing disparity. To minimize judicial disparity in sentencing, the Commission attempted to minimize discretion at every turn. Thus, it focused on quantitative measures, such as the value of the theft, or the amount of the drugs, or the number of convictions, rather than social background, or medical or psychological condition, even if those factors had played an important role in sentencing in the past and correlate to a degree with recidivism or rehabilitation.

Without social scientific studies, much less an adequate explanation, the Commission invented entirely new criteria for sentencing, in effect, a new vocabulary.[45] There were minimal hearings, little or no legislative history. And without any meaningful description of the context of the Guidelines, it was difficult to interpret them. All that the judges had were words on a page, categories, grids, numbers. Too often what the Commission did was just what Congress did: it took the sentences proposed by one side or the other, and split the difference.

In short, this was not a high-minded Commission with expertise in penology, deterrence, rehabilitation, etc., adding a new and different voice to sentencing policy. This was not the Commission populated by academics with real social science expertise. This was what Justice Scalia described as "a junior varsity Congress,"[46] political from the outset, largely responding to Congressional pressure to get "tough on crime" no matter how arbitrary the result.

Even without the patina of a civil code-type system, the fact that the Guidelines were numerical—i.e., base offense 12, add 2 for role in the offense, subtract 3 for acceptance of responsibility—had an extraordinary impact. The phenomenon is called "anchoring" by cognitive psychologists. Anchoring is a heuristic or strategy used to simplify complex tasks and save mental effort, in which "numeric judgments are assimilated to a previously considered standard."[47] When asked to make an estimate or judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it upward or downward to accommodate the particular details of the case. The value of the anchor that is initially provided may, in many cases, be crucial to the outcome.

The civil code ideology, the impact of anchoring, juxtaposed on top of a flawed indeterminate sentencing system meant that there would be little or no common law of sentencing. District Courts applied the guidelines mechanistically. Appellate court

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[44] STITH & CABRANES, *supra* note 5, at 38–59.

[45] *Id.*

[46] *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

[47] Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536 (2001).

decisions were formulaic.[48] In fact, the principle goal of appellate review of Guidelines departures was to limit them.

The appellate courts did not *say* the Guidelines were mandatory; they did not have to.

III. *BOOKER* AND BEYOND

In *Booker*, the Court declared the Guidelines advisory. Let me spend a moment describing how *Booker* bears on my theory of judicial sentencing expertise: When the guidelines were indeterminate and juries determined guilt or innocence, judges exercised "therapeutic judgment" within the broad limits set by the Congress. What the jury did was different from what the judge did. As the Guidelines became mandatory, what the judge did and the jury began to look alike, finding facts with mandatory consequences. In effect, *Booker* announced that in order to avoid the constitutional consequences of the mandatory regime, the courts had to exercise judgment again. The Guidelines had to be advisory. The judge was to sentence, bearing in mind all of the purposes of sentencing; review would consider the "reasonableness" of the sentence and not its rigorous compliance with the Guidelines.[49]

But announcing that the Guidelines were advisory did not make them so. In fact, in the 18 months since *Booker*, it was "deja vu all over again" as Yogi Berra might say.[50] By the time the decision had come down, the composition of the federal courts had changed and changed dramatically. This time, when the Commission issued a report on the judges, which districts were acting "in conformance" with the Guidelines, which were not, there was, nary a whisper from the federal court.[51] This time when the Commission canvassed judicial attitudes to the Guidelines, only 22% ranked the Guidelines as "low" in achieving the purposes of punishment.[52]

Rigid, numerical categories still anchored sentencing. The civil code ideology persisted. In fact, in the new advisory regime, judge after judge announced that the Commission had considered *all* the purposes of sentencing; the Guidelines perfectly embodied them. All the judge had to do—the expert clerk again—was to apply them.

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[48] Reitz describes the approach of courts of appeals as focusing on the "enforcement" mode rather than substantive law making. Reitz, *supra* note 18, at 106.

[49] For a more complete explanation, see *United States v. Jaber*, 362 F. Supp. 2d 365, 369 (D. Mass. 2005).

[50] Judge Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. (POCKET PART) 137 (2006), *available at* http://www.thepocketpart.org/2006/07/gertner.html.

[51] The Commission issued a report on post-*Booker* sentencing, describing what percentage of judges were sentencing "in conformance" with the Guidelines. UNITED STATES SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (last checked March 1, 2007).

[52] Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENT'G REP. 215, 218 (2003).

Just a day after *Booker*, Judge Paul Cassell came perilously close to concluding that the Guidelines were the only source of legitimate sentencing authority. He wrote in *United States v. Wilson*, that he "will give heavy weight to the Guidelines in determining an appropriate sentence," and "will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons." [53] He based his conclusion not merely on a reading of *Booker*, but an independent evaluation of the Guidelines regime, an evaluation virtually on all fours with the civil code approach I have described here—that the Guidelines are comprehensive, that they fully and completely reflect the purposes of sentencing, that Congress and the Commission are better suited to make these determinations than judges, and in effect, that the judges, *Booker* or no *Booker*, should return to their roles as "operators of a machine designed and built by legislators." Other judges went further:

> We are likely to muck things up even more if we do our own thing . . . [U]nlike Congress or the Commission, we judges lack the institutional capacity (and frankly, the personal competence) to set and then enforce one new, well chosen, theoretically coherent national standard [for drug penalties]. As opposed to uniform albeit flawed Guidelines, it would make things far worse to have a bunch of different standards for crack sentencing.[54]

In effect, judges were incompetent to sentence without detailed direction from the legislature or its deputy in sentencing matters, the U.S. Sentencing Commission.

And that post-*Booker* observation, mirrored the growing feeling of "incompetence" that was growing pre-*Booker*, Hon. Alex Kozinski of the Ninth Circuit, noted:

> I found sentencing traumatic in the pre-Guidelines days. The sentencing range often spanned many years, sometimes all the way from probation to life in prison. Some judges may have the wisdom of Solomon in figuring out where in that range to select just the right sentence, but I certainly don't . . . Somehow I felt it was wrong for one human being to have that much power over another . . . Sentencing ranges [established by the Guidelines] are narrow and presumably take into account all those factors I don't feel competent to weigh: punishment, deterrence, rehabilitation, harm to society, contrition—they're all engineered into the machine; all I have to do is wind the key.[55]

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[53] United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005).

[54] United States v. Tabor, 365 F. Supp. 2d 1052, 1060–61 (D. Neb. 2005).

[55] Alex Kozinski, *Carthage Must be Destroyed*, 12 FED. SENT'G REP. 67, 67 (2002).

The belief that judges were not competent to sentence without code-like diktats from a Sentencing Commission represents an extraordinary attitudinal shift in less than two decades. From an overblown sense of their own expertise in the indeterminate sentencing days, some judges—and surely some politicians—now have an overblown sense of judge's *incompetence*.

What is really meant by "competence?" I can see at least two interpretations. When we speak, for example, about whether judges are "competent" to address national security matters we are speaking, to a degree, about concrete matters like training, the problems of access to classified information, the necessity for speed. But when we speak about whether an unelected judiciary is "competent" to consider political questions we are speaking about legitimacy.

No one doubts that judges are "competent" in the first sense. After all, judges are given the authority to review punitive damage awards and reduce them without specific standards or formulae based entirely on their judgment. We authorize judges to set civil monetary penalties, without explicit Congressional directives. No one challenges courts' ability to rule consistently in tort cases, or contracts, to set national standards through judge made rules. Likewise, no one should challenge the judiciary's ability to craft national sentencing standards, as the common law judges have done in other areas. If my non-Guideline sentence is based on sound reasoning, other district courts across the nation will follow. If the appellate courts disagree, they will say so, and a different standard will emerge. This is in fact how a common law of sentencing evolved in Australia, Canada, and Israel.

And no one should question judge's competence in the second sense. Indeed, if the opinions I have quoted suggest that the judicial voice in sentencing is no longer "legitimate," then the changes in sentencing are even more dramatic and troubling than first appears. Under this view, sentencing is only supposed to reflect the public's will, as mediated by the Congress and Congress alone. An unelected judiciary, according to these critics, has no more legitimacy in venturing into this area than it does in the area of traditional political questions. And equally implicit here is the view that sentencing is exclusively about retribution, as to which the public and Congress, as their representatives, not the courts, are "experts."

But sentencing is about more. It is about proportionality; it requires individualizing so that the punishment fits the crime. It is not now, nor has it ever been, a one size fits all approach. It is continues to be about deterrence and rehabilitation. Indeed, far from being incompetent or illegitimate, judicial decision-making is central to that enterprise.

To be sure, sentencing in the United States cannot return to where it was pre-Guidelines. Post *Booker* judicial decision-making is necessarily taking place within the existing Guidelines framework. Whatever we call the Guidelines—and I have argued for not labeling them anything[56]—they will necessarily supply the general framework for sentencing, particularly until there are alternative approaches. The task

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[56] *See* Gertner, *supra* note 50.

of judging will be to evaluate and where appropriate, reject the Guidelines in particular cases, or at times, more generally.[57] And, this time, with real training, judges will learn to critically evaluate the sentence the Guidelines suggest, to apply the teachings of social scientists, for example, about treatment of addicts and the efficacy of lengthy prison terms to be real experts in a difficult and changing field. And, more significantly, from time to time, judges may even be called upon to do that which is uniquely judicial, to temper the harsh effects of sentencing policy with an old-fashioned concept—mercy.

I am reminded of a comment made by Justice Aharon Barak, then Chief Judge of the Israeli Supreme Court. He was considering where the wall between Israel and the Palestinian territories should be. I asked him how he or any judge was competent to evaluate national security issues. He answered: the state officials are experts in security. I am an expert in proportionality.

Just so.

[57] Some, for example, have argued for an administrative law review of particular Guidelines, asking whether they rationally relate to the purposes of sentencing. *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 231–33 (2005).